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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 502nd MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 9 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377, A/CN.9/378/Add.1)

Consideration of draft Model Law on Procurement (continued)

Article 18 (continued)

1. The CHAIRMAN, recalling the question raised at the end of the previous meeting by the observer for Venezuela and his own reply, said that the purpose of article 18 (2) was to promote transparency and foster competition, and in his view article 18 (2) should be retained as it stood.

2. In that connection, he recalled that in the draft Guide to Enactment (document A/CN.9/375) the Secretariat drew attention to the business edition of Development Business (published by the United Nations Department of Public Information and the United Nations University) as a possible publication medium.

3. Mr. ANDERSEN (Denmark) said that, if the principle of non-discrimination on the basis of nationality was to be upheld, article 18 (2) had to be retained as it stood, so that suppliers and contractors might have access to the necessary information.

4. Mr. JAMES (United Kingdom), agreeing with the Chairman and the representative of Denmark, said that, in his view, the concern of the observer for Venezuela that tendering for small contracts should not be unduly expensive was met in article 17.

5. Mr. WALLACE (United States of America), supporting that view, said it was important for procuring entities to avoid a narrow, nationalistic approach and to think in terms of their obligation to the taxpayer to ensure the most effective competition possible.

6. Mr. TUVAYANOND (Thailand) said that the point at issue - which had originally been raised by him - was not discrimination on the basis of nationality.

7. In his view, the nationwide dissemination of an invitation to tender in a language customarily used in international trade should suffice. Most countries were represented abroad by embassies or consulates, which had access to the national newspapers and journals of the countries where they were located and should be on the alert for any business opportunities - for example, in the field of road or railway construction - that might arise.

8. He himself would find it difficult to persuade his Government that it should go to the trouble of publishing invitations to tender or prequalify in international newspapers or journals. It was not a matter of whether such a procedure was expensive, but of whether it was necessary.

9. Mr. AZZIMAN (Morocco) shared that view. The procuring entity should be given the option of using the national press, resorting to international publications only when appropriate.

/...

(Mr. Azziman, Morocco)

10. He wondered whether the envisaged system might not have the indirect effect of disadvantaging national firms which did not have access to international publications and might thus not receive the required information in time.

11. Mr. ANDERSEN (Denmark) said, besides large companies tendering for major projects, one had to think of small companies engaged in what was known as "niche production" - i.e. making various highly technical items for which there was demand all over the world. Such companies could not reasonably be expected to follow the demand for their products if procuring entities did not use newspapers and journals of wide international circulation, and neither could their Governments.

12. There had to be a proper balance between the burden on the procuring entity and the burden on the tenderer, and he felt that the draft Model Law struck it.

13. Mr. KLEIN (Observer for the Inter-American Development Bank) endorsed the views expressed by the representative of Denmark.

14. Mr. PEREZNIETO CASTRO (Mexico) said that, in his opinion, the responsibility for disseminating information should lie with the potential supplier or contractor and not with the procuring entity.

15. Mr. TUVAYANOND (Thailand) shared that opinion; his Government had had to spend money it could ill afford sending representatives to other countries in order to find suppliers and contractors capable of meeting its needs. Businessmen should make the effort to find out what demand for their products existed, using their embassies and consulates, which had ready access to the necessary information.

16. He proposed that the words "of wide international circulation" be deleted where they occurred in article 18 (2).

17. Mr. MORAN BOVIO (Spain) said that businessmen, on learning about an invitation to tender, should also make use of the embassies and consulates representing the country of the procuring entity that issued the invitation.

18. Mr. WALLACE (United States of America), noting that a Government could always opt for domestic procurement, said that, if a particular legislature, such as that of Thailand, wished not to enact article 18 (2), it was free to do so. The Commission's report should reflect the fact that there were Governments which did not wish to enact it.

19. Mr. PARRA PEREZ (Observer for Venezuela) said that in many developing countries, in an effort to prevent corruption, great efforts were being made to change the way public works contracts were handled; there was now sometimes a legal requirement for international tendering even in the case of very small projects. The cost of complying with article 18 (2), however, might jeopardize such efforts.

20. Mr. JAMES (United Kingdom), responding to one of the points made by the representative of Thailand, said that no countries had embassies or consulates in all other countries. In any case, the main function of trade representatives at diplomatic and consular missions was not to disseminate information about public procurement, but to advise and assist companies engaged in negotiations. Moreover, the publication of invitations to tender or prequalify in international newspapers or journals produced a better response.

21. Mr. HAINZL (Austria) said that, given the importance of international procurement in promoting international trade, an objective referred to in preambular paragraph (b), he believed that article 18 (2) should be retained as it stood.

22. Mr. KOMAROV (Russian Federation) said that, although preambular paragraph (b) spoke of "promoting international trade", preambular paragraph (a) spoke of "maximizing economy and efficiency in procurement". In his view, it should be left to the procuring entity to decide on the most economic and efficient method of procurement - and therefore on whether to apply article 18 (2).

23. Mr. PRIESTLEY (Observer for Australia) suggested that reference be made in the Model Law to the business edition of Development Business. If that publication became established as the recognized medium for invitations to tender or prequalify, publication costs would be minimized. If such a reference was considered excessive, one might make a more positive statement in the Guide to Enactment about using that publication.

24. The CHAIRMAN said he sensed that there was a consensus in the Commission for retaining article 18 (2) unchanged. It had been sufficiently explained that States, including developing countries, would elicit more competitive tenders by widely publicizing their invitations to tender or prequalify in international publications. Also, the Guide to Enactment might stress the value of using the business edition of Development Business.

25. In the absence of any objections, he took it that the Commission wished to adopt article 18 (2) as submitted by the Working Group in the annex to document A/CN.9/371.

26. It was so decided.

27. The CHAIRMAN, inviting the Commission to consider article 18 (3), which dealt with procedures for soliciting tenders or applications to prequalify on a restricted basis (so-called "restricted tendering"), said that it provided for three safeguards: the requirement that the number of suppliers or contractors selected should be sufficient; the requirement that the grounds and circumstances for soliciting on a restricted basis should be recorded in the record of the procurement proceeding; and the need to seek approval.

28. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 18 (3) provided for a procurement method which, although an exception to the general rule, was commonly employed in Latin America. In his view, it should therefore be moved to chapter II.

(Mr. Klein, Observer for the Inter-American Development Bank)

29. Also, he felt that the reasons justifying use of the method ("reasons of economy and efficiency") were open to abuse; something less broad and vague was necessary.

30. Mr. UEMURA (Japan), noting that article 18 (3) spoke of the procuring entity "sending invitations to tender or invitations to prequalify ... only to particular suppliers or contractors selected by it", suggested that, in the interests of transparency, the procurement entity should be required to issue a prior public announcement that it was sending invitations to selected suppliers or contractors. That would be in accordance with paragraph (4) of article 5 of the GATT agreement on government procurement.

31. Mr. PEREZNIETO CASTRO (Mexico) agreed with the observer for the Inter-American Development Bank that article 18 (3) should be moved to chapter II.

32. With regard to the question of transparency, he was not convinced that prior public announcement as envisaged by the representative of Japan would be appropriate to restricted tendering, but he did believe that, in order to minimize the possibility of abuse, the subsequent publication of information on the proceedings was very desirable.

33. Mr. GRIFFITH (Observer for Australia) agreed with the observer for the Inter-American Development Bank that the formulation "reasons of economy and efficiency" was very weak and proposed the insertion of a reference to "exceptional and particular circumstances" and - as agreed at the previous meeting in connection with article 16 - a reference to the need for approval by high government authority.

34. Mr. AZZIMAN (Morocco), supporting the placing of article 18 (3) in chapter II, proposed that the procuring entity be required to state in advance its criteria for the selection of suppliers or contractors to be invited to submit tenders or applications to prequalify and that, following the award of the contract, it be required to record the reasons for its choice of supplier or contractor.

35. Mr. TUVAYANOND (Thailand) said that chapter II would be a more appropriate place for article 18 (3) and that the proposal made by the observer for Australia was a useful one. Also, it would be helpful if the record of the exceptional proceedings provided for in article 18 (3) was accessible to the public.

36. Mr. PARRA PEREZ (Observer for Venezuela) said that in some countries where restricted tendering was practised there was no possibility of challenging the procuring entity's selection of suppliers or contractors to be invited to submit tenders or applications to prequalify as there was no provision for cancelling the selection. It was therefore necessary to be very precise about the conditions under which restricted tendering would be permitted.

37. Mr. HUNJA (Chairman of the Working Group) said that, before deciding that article 18 (3) should be moved to chapter II, the Commission should bear in mind that moving it there would in effect add a further method of procurement to those already referred to in that chapter.

38. Regarding the view that the formulation "for reasons of economy and efficiency" was very weak, in an earlier draft of the Model Law the Secretariat had proposed (on page 17 of the English version of document A/CN.9/WG.V/WP.28) a wording that set out in detail the circumstances under which restricted tendering might be resorted to. The Working Group had decided, however, that the proposed wording was too detailed and had agreed to adopt the formulation now under discussion. Clarification of the circumstances under which the procurement entity would be permitted to resort to restricted tendering might be worthwhile if the Commission felt that the present formulation was open to abuse, but members should perhaps first refer to documents A/CN.9/WG.V/WP.28 and A/CN.9/343 so as to ascertain the position of the Working Group on that question.

39. Mr. JAMES (United Kingdom) said that the words "economy and efficiency" referred back to "economy and efficiency in procurement" in paragraph (a) of the preamble. If those words were retained, perhaps "in procurement" should be added.

40. Regarding the proposal made by the observer for Australia, he suggested that the reference to "exceptional and particular circumstances" also be added, so that the phrase in question read: "..., when in exceptional and particular circumstances it is necessary for reasons of economy and efficiency in procurement". As to the reference to the need for approval by a high government authority, he questioned whether restricted tendering was such an undesirable procurement method that such approval was necessary.

41. He did not think that article 18 (3) should be moved to chapter II. Perhaps the point raised by the observer for the Inter-American Development Bank could be addressed by stressing in the Guide to Enactment that article 18 (3) provided for a procedure which was less desirable than open tendering but which might in some circumstances be appropriate.

42. Mr. MORAN BOVIO (Spain) suggested that the various proposals made during the discussion be set forth clearly in a conference room paper, as a basis for further discussion.

43. Mr. WALLACE (United States of America) agreed with the observer for Australia on the desirability of including an approval requirement and making the criteria for recourse to restricted tendering more rigorous.

44. As to the question of moving article 18 (3) to chapter II, on the grounds that restricted tendering was a procedure of which the Commission basically disapproved, relocation might simply result in the procedure's enjoying greater prominence. If article 18 (3) was going to be moved to chapter II, perhaps the best place for it would be at the end of the chapter - as a new article 17. Alternatively, it could be kept in chapter III, as a new article 18 immediately before the present article 18. The essential point was that restricted tendering was abused in some parts of the world, and camouflaging the procedure would not help to curb the abuse.

45. Mr. AL-NASSER (Saudi Arabia) said he failed to see how greater economy and efficiency could be achieved by restricting the number of suppliers or contractors invited to submit tenders or applications to prequalify.

46. Mr. KLEIN (Observer for the Inter-American Development Bank), reiterating his view that article 18 (3) should be moved to chapter II, said that that chapter provided for procurement methods of which some (such as competitive negotiation and two-stage tendering) were unknown in Latin America, whereas the provision for restricted tendering - a procurement method widely employed in Latin America - was hidden away in a chapter on tendering procedures.

47. With regard to the words "reasons of economy and efficiency", something even more explicit than what had been proposed during the discussion was necessary. The Guide to Enactment contained a very full enumeration of the circumstances that could trigger recourse to restricted tendering, and the Model Law itself should be equally explicit.

48. Mr. LEVY (Canada) said that he could see no point in moving article 18 (3) to chapter II and that he was in favour of the United Kingdom representative's suggestion regarding the combining of a reference to "exceptional and particular circumstances" with the reference to "reasons of economy and efficiency in procurement". The reference to the need for approval by a high government authority should perhaps be placed in parentheses.

49. Ms. PIAGGI-VANOSSI (Argentina), supporting the idea of moving article 18 (3) to chapter II, emphasized the importance of a rigorous approach to restricted tendering. With regard to the last sentence of article 18 (3), in the interests of transparency the record of the procurement proceedings should state what benefits in terms of economy and efficiency had been achieved by resorting to that procedure.

50. Mr. RAO (India), noting that restricted tendering was sometimes resorted to in India, suggested that article 18 (3) be moved to chapter II and that the wording suggested by the representative of the United Kingdom be adopted.

51. The CHAIRMAN asked whether the Commission could agree that the paragraph under discussion become a new article, 18 bis, with the wording suggested by the representative of the United Kingdom and - in parentheses - the reference to approval by a high government authority.

52. Mr. GRIFFITH (Observer for Australia) felt that the phrase "when necessary for reasons of economy and efficiency" and the words "in exceptional and particular circumstances" should not be combined as suggested by the representative of the United Kingdom.

53. Mr. WALLACE (United States of America) suggested that the new article be numbered 17 bis.

54. Mr. MORAN BOVIO (Spain) said that most speakers had seemed to be in favour of moving article 18 (3) to chapter II.

55. Mr. PEREZNIETO CASTRO (Mexico), expressing support for the first point just made by the observer for the Inter-American Development Bank, said he continued to believe that article 18 (3) should be moved to chapter II. At the same time, he felt that additional safeguards were necessary in order to ensure that restricted tendering was not abused.

56. Mr. AZZIMAN (Morocco) said that the paragraph dealing with restricted tendering should logically appear with the paragraphs dealing with other procurement methods that constituted exceptions to the rule of 100 per cent open tendering. It was true that some reservations had been expressed about moving article 18 (3) to chapter II, but they had not struck him as being very strong.

57. Moving article 18 (3) to chapter II would no doubt somewhat disturb the present structure of the Model Law, which would have to be adjusted, but that was not an insurmountable task; an informal group set up by the Chairman could tackle it.

58. Mr. PARRA PEREZ (Observer for Venezuela), supporting the statements just made by the representatives of Morocco and Mexico, said that the important point was not where the provisions contained in article 18 (3) finally appeared in the Model Law but how to ensure that the Model Law provided for restricted tendering, which was a useful intermediate between 100 per cent open tendering and direct purchasing, and to ensure that the procedure was not abused.

59. Ms. CRISTEA (Observer for Romania) said that, if article 18 (3) meant that foreign suppliers and contractors were excluded from restricted tendering, it might as well be incorporated into article 17. If foreign suppliers and contractors were not excluded, it ought perhaps to be incorporated into article 16, for only a very few suppliers or contractors were likely to be able to penetrate the market in question when restricted tendering was being practised. At all events, restricted tendering should not appear as a separate procurement method as it might thereby become the norm in the case of some countries.

60. Mr. KOMAROV (Russian Federation) said that the risk of restricted tendering becoming the norm could to some extent be reduced by placing the procuring entity under more rigid controls. That might be achieved by deleting from article 38 the subparagraph - subparagraph 2 (c) - which exempted from review the limitation of solicitation of tenders on the ground of economy and efficiency pursuant to article 18 (3).

61. The CHAIRMAN proposed that the discussion be suspended and requested concerned delegations to meet with him later in order to see how the problems associated with article 18 (3) might be resolved.

Article 19

62. Mr. SAHAYDACHNY (Secretariat), referring to document A/CN.9/377, said that the reference to article 8 (1) (a) in article 19 (1) (d) was a typographical error; the reference should be to article 6 (2).

(Mr. Sahaydachny, Secretariat)

63. With regard to the change in article 19 (2) which the Secretariat was proposing, he said that the procuring entity might sometimes already have decided on "the place and deadline for the submission of tenders" (mentioned in subparagraph (j) of article 19 (1)) at the time when it was issuing the invitation to prequalify. If the change proposed in document A/CN.9/377 was adopted, a corresponding change would have to be made in the provisions concerning prequalification documents.

The meeting rose at 12.30 p.m.